IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 499.

FEDERAL COMMUNICATIONS COMMISSION, *Petitioner*,

v.

SANDERS BROTHERS RADIO STATION.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR RESPONDENT.

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Opinions Below.

The opinion of the United States Court of Appeals for the District of Columbia (R. 470-7) is reported in 106 F. (2d) 321. The order of the Federal Communications Commission granting the application of the Telegraph Herald, entered July 2, 1937 without opinion, is found at R. 406-7. The Commission's Statement of Facts and Grounds for

Decision, adopted July 30, 1937 (4 F. C. C. 392), is found at R. 408-16. The Commission's order denying respondent's petition for rehearing without opinion, entered December 8, 1937, is found at R. 468.

Jurisdiction.

The judgment of the Court of Appeals reversing the Commission's decision was entered January 23, 1939 (R. 477). The Commission's petition for rehearing was denied August 2, 1939 (R. 478). The Commission's petition for a writ of certiorari was filed November 2, 1939, and was granted December 11, 1939. The jurisdiction of this Court rests on Sec. 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

The respondent appealed from a decision of the Commission granting the application of the Telegraph Herald for a construction permit authorizing the construction and operation of a new radio broadcast station in the same territory in which respondent operates a station. The questions presented are:

1. Is respondent "a person aggrieved or whose interests are adversely affected" by the decision of the Commission, within the meaning of Sec. 402(b)(2) of the Communications Act, so that the Court of Appeals had jurisdiction to entertain the appeal?

2. Was the Commission, under the circumstances of this case, obligated to make findings of fact on the issue whether sufficient economic support is available in the community where the proposed new station is to be located to permit both stations to continue in operation and to render service meeting the standard of public interest, convenience, or necessity?

3. Did the Commission err in considering certain confidential memoranda submitted to it by the Engineering, Law and Examining Departments, the

memoranda not having been received in evidence nor served upon respondent?

Statute Involved.

The pertinent provisions of the Communications Act of 1934 (Act of June 19, 1934, c. 652, 48 Stat. 1064, as amended by the Act of June 5, 1936, c. 511, 49 Stat. 1475; and as amended by the Act of May 20, 1937, c. 229, 50 Stat. 189; 47 U. S. C., Secs. 151, *et seq.*) are Secs. 3(h) and (o), 4(j) and (l), 301, 303(a) to (k), 307, 308(b), 309, 310, 312, 319, 325(b) and (c), 326, 402, and 404. The sections not found in the Appendix to the Commission's brief are reprinted in Appendix D.

Statement.

The statement set forth in the brief of the Commission is adequate for the decision of the issues involved in this case, except in the following respects:

1. Respondent's petition to intervene in the proceedings held in connection with the application of the Telegraph Herald, filed on August 18, 1936, was granted by the Commission on August 20, 1936 (R. 24). The petition for intervention alleged, among other things:

> "There is insufficient advertising revenue available in the Dubuque area to support an additional radio outlet and the granting of the above-described application would therefore seriously impair the type of service now being rendered by Station WKBB" (R. 23).

The Telegraph Herald is the only non-sectarian daily newspaper published in Dubuque (R. 61, 143, 384).

2. The motion of the Commission to dismiss respondent's appeal was based *solely* upon the ground that the appeal had not been timely presented.[1] The sole point made by the Commission with respect to respondent's appealable inter-

[1] Appendix C, p. 110.

est, *prior* to the lower court's decision on January 23, 1939, was made in the Commission's brief and argument on the merits, and is sufficiently disclosed by the following excerpt from the Commission's petition for rehearing in that court, filed February 9, 1939:

> "* * * As to the jurisdictional question, the Commission heretofore took the position that the appellant could not sustain its allegation of economic injury through the establishment of the additional station by the intervener. In other words, the Commission heretofore assumed, *arguendo*, that financial loss as a result of competition from a broadcast station authorized by order of the Commission, if proved, would constitute a basis for an appeal under Section 402(b)(2) of the Act, and argued that the appellant in this case has failed to prove its alleged economic injury. The jurisdictional point now raised is, assuming *arguendo* that the appellant can prove that it will suffer pecuniary loss from competition with the new station of the intervener, such loss is *damnum absque injuria.*"[2]

3. On July 30, 1937, respondent filed with the Commission a notice and demand, in which it alleged upon belief that, after oral argument and prior to the decision of the Broadcast Division of the Commission in this case on July 2, 1937, various memoranda or reports on the case were presented by the Engineering, Law and Examining Departments to the Broadcast Division for its consideration in making or arriving at a decision; and that respondent had had no opportunity to be confronted with the facts therein contained or to make answer thereto, or, in the case of the Engineering Department's report, to cross-examine the Engineering Department's representative with respect thereto. Respondent, expressing its intention to file a petition for rehearing before the full Commission and a desire to be apprised of all matters, including these three reports, which were considered by the Broadcast Division in making

[2] Appendix C, p. 112.

a determination upon the case, made demand that it be served with any and all of these reports (R. 418). This demand was refused without opinion by the Broadcast Division on August 18, 1937 (R. 420).

In its petition for rehearing before the full Commission, filed August 11, 1937, respondent stated, among other things:

> "2. Petitioner is informed and believes and upon such information and belief alleges as a fact that the Broadcast Division in arriving at its decision considered certain confidential reports which were submitted by the Examining Department, the Law Department, and the Engineering Department of the Commission, as more fully set forth and described in Petitioner's Notice and Demand filed with the Broadcast Division on July 21, 1937, (sic) which is incorporated by reference herein. Said reports, if presented for consideration as alleged herein and in said Notice and Demand, were never served or made available to Petitioner as provided in Rule 106.28, and Petitioner, in being denied an opportunity to be confronted with the facts contained in said reports and to make answer thereto, has been deprived of a full and fair hearing as required by due process of law and the Constitution of the United States, Fifth Amendment." (R. 421-2)

and asked

> "2. That the Commission issue a rule requiring the Broadcast Division to produce and make available to Petitioner any or all of the several reports heretofore described in said Notice and Demand filed July 29, 1937." (sic) (R. 432)

This petition was denied by the full Commission without opinion on December 8, 1937 (R. 468).

Respondent assigned, among its reasons for appeal, that the Commission erred in denying its request that it be served with copies of these reports, and in considering these reports without serving them upon respondent and giving it opportunity to make answers thereto (R. 2). After tak-

ing the appeal, respondent suggested a diminution of the record, the relevant portion of which is reproduced in the lower court's opinion (R. 475-6). In reply the Commission simply stated that the reports

> "do not themselves constitute evidence in the record nor were they so considered by the Commission in making its decision." (R. 476)

A similar statement was made in the Commission's brief in the court below (R. 477). The statement that such reports were submitted to and considered by the Broadcast Division in arriving at its decision is not controverted; the Commission asserts only that they were not "used as evidence" (R. 477).

4. The respondent sustained a net loss of $4,165.85 for the year 1935 and $475.28 for the first eight months of 1936. It has not operated at a profit since its station went on the air in 1933 (R. 160, 370). The Telegraph Herald estimated that its operating expenses would approximate $2,000 per month (R. 411), but the only evidence of advertising commitments for its proposed station consisted of the testimony, hearsay in character, that sixty merchants in Dubuque had evidenced a desire to advertise (R. 44). Thirty-three of these sixty merchants had used respondent's station in the past, and eighteen merchants purchased time on respondent's station during 1936 (R. 1). The only finding of economic support made by the Commission, other than general characterizations of the trade area, was that "A large number of advertisers have signified that they would be interested in using the station as an advertising medium" (R. 411).

5. Both respondent's station and the station proposed by the Telegraph Herald will render satisfactory service over approximately the same area (R. 412, 415). The rural service rendered by respondent and proposed to be rendered by the Telegraph Herald is of significance because

the program plans of the Telegraph Herald emphasized agricultural broadcasts (R. 412). As revealed by measurements of a radio engineer, ten broadcast stations render a satisfactory service at various points within this area (R. 365).[3] Two of the stations are licensed to agricultural organizations and others also cater to the farm population (R. 57, 58, 202, 309, 331, 334). The stations serving this area in whole or in part are (in addition to WKBB) WGN, WMAQ, WENR-WLS, and WBBM, Chicago, Illinois; WMT, Cedar Rapids, Iowa; WHO, Des Moines, Iowa; WSUI, Sioux City, Iowa; WOI, Ames, Iowa; and WTMJ, Milwaukee, Wisconsin (R. 365). Except for the service rendered by respondent's station, the Commission made no finding concerning available broadcast service.

6. A comparison of the program plans of the Telegraph Herald with the service rendered by respondent's station shows that the proposed service will duplicate the service now available from Station WKBB (Cf. R. 163-70 and R. 371-2 with R. 47-53 and 351-60). The examiner, in recommending that the application of the Telegraph Herald be denied, commented upon the program plans as follows:

> "2. The applicant [the Telegraph Herald] has failed to establish a need for additional daytime service in the area proposed to be served; nor does the applicant propose to render any new, novel, or different service from that already being received in that area. * * *" (R. 398)

[3] The Standards of Good Engineering Practice state in Table II that a signal of one-half millivolt per meter is considered satisfactory in towns having a population up to 2,500 (Standards of Good Engineering Practice, approved June 23, 1939, effective August 1, 1939, Sec. 1, Table II).

Summary of Argument.

"Public interest, convenience or necessity" is the substantive law of Title III of the Act. The question as to what parties have the right to appeal under Sec. 402(b)(2) is a separate question.

1. Under the broad standard "public interest, convenience, or necessity", sub-standards must be formulated, either as regulations or as principles applied in actions on applications. These sub-standards may be with respect to (a) matters which *must* be taken into account, or (b) matters which, in the Commission's expert discretion, *may* be taken into account. Commission determinations of the latter class will ordinarily not be set aside unless shown to be arbitrary and capricious. Petitioner, however, contends that the matter of economic injury may *not* be taken into account, *i.e.*, it falls outside the scope of sub-standards permitted by "public interest, convenience or necessity".

Petitioner has no standing to raise this issue, having raised the point for the first time in this Court and having heretofore expressly concurred in the lower court's view.

Once the radio spectrum has been sub-divided into bands of frequencies, and these bands have been allocated among the several radio services, the issuance of most licenses, permits and other authorizations is merely a routine matter involving no process of selection. The principal classification of stations in which the process is involved is broadcasting.

In applying the process to broadcasting, the whole field of sub-standards possible within the limitations of scientific facts may be classified under three heads (a) fair, efficient and equitable distribution of radio service as prescribed by Sec. 307(b), (b) economic factors, and (c) character and past performance of competing applicants. Much of the last-mentioned is excluded by Sec. 326 forbidding censorship of programs.

Sub-standards to foster location of stations where adequate support is available are at least justified, and probably required, by the mandate of fair, efficient and equitable distribution. The Commission itself has taken this view. Other provisions of Title III at least authorize, and perhaps require, such sub-standards, including (a) the public utility history and connotation of "public interest, convenience or necessity," and its necessary meaning as applied to the licensing of stations to communications carriers, (b) the direction in Secs. 309(a) and 319(a) that an applicant's financial ability to construct a station be taken into account, and (c) the implications with respect to *actual*, not theoretical, preservation of competition, both in situations such as exist in Dubuque (the Telegraph-Herald being the only non-sectarian newspaper in Dubuque) and in other cities for which the facility becomes unavailable if used in Dubuque.

For many years, with inconspicuous exceptions until recently, the Commission has given effect to respondent's view in its administrative interpretation of "public interest, convenience or necessity", in its actions on applications under Secs. 309(a), 310(b), 319(a) and 325(c), and in performing its legislative functions under Sec. 303.

Consequently, in applying the standard "public interest, convenience or necessity," the Commission either (a) *must* take the economic factor into account where, as in this case, the point is properly raised and strongly supported by evidence, or (b) it may take it into account and, in view of its recognition of the issue as legitimate both in this case and in its administrative interpretation for years, has acted arbitrarily and capriciously in failing to give it effect.

2. Respondent is a "person aggrieved or whose interests are adversely affected" within Sec. 402(b)(2).

The statute confers the right of appeal on *some* class or classes of persons. It must not be interpreted so as to produce an absurd, ineffective or inefficient result. The de-

scription of persons who may appeal is not made subject to "public interest, convenience or necessity".

Petitioner has no standing to urge that respondent is not within the description, having first made the point (and then not in its present form) on petition for rehearing in the court below.

The context shows that Congress intended the description to have a substantial scope such as contended for by respondent, not limited to "legal aggrievement". This is particularly true of Secs. 402(d) and 405 which use the same phraseology and 309(a) as interpreted by the Commission for many years. The same is demonstrated by Sec. 5 of the Radio Act of 1927 (providing for appeals from the Secretary of Commerce to the Commission) from which the description was originally taken; by the legislative history of Sec. 16 of the Radio Act of 1927; by its defects and other circumstances leading to amendment July 1, 1930; and by the substantial re-enactment of the amended Sec. 16 as Sec. 402(b) to (f) of the Communications Act of 1934 after and in the light of repeated decisions by the court below during the intervening period.

Consideration of the actual nature and extent of the adverse effect leads to the same conclusion. Whether the injury caused by a new station be technical (interference) or economic, its nature is the same, *i. e.*, loss of listeners. The essential character of a broadcast station, as defined by law, is that it is licensed for "the dissemination of radio communications intended to be received by the public". When its public is decreased, it is adversely affected in its most vital feature. The loss of listeners resulting from a new station in the same community may be as great as that resulting from interference, or greater. Sound policy requires that persons having so real an interest should have a public forum for expression of their opposition rather than to be driven into other channels. The statute has been in effect almost ten years without occurrence of the extreme situations predicted by Petitioner.

3. If the Commission was required in this case to take into account the question whether Dubuque can support a second station, the Commission's obligation to make a finding on the issue seems axiomatic.

Petitioner construes Sec. 309(a) as giving the Commission unlimited discretion to *grant* applications without hearing and as not requiring it to hold any hearing except as a condition precedent to denial; as therefore not requiring any findings where it grants an application even where a hearing has been held; and as not requiring any findings when it denies an application unless and until an appeal is taken and then not until 60 days after the notice of appeal has been filed. It contends that it is not the responsibility of the Commission (which it assumes to be a purely executive agency) to afford due process, but of the courts.

The Commission's administrative interpretation of Sec. 309(a) since the early days of the Federal Radio Commission until recently, expressed in a series of codified regulations continuously in force, has been diametrically opposed to its present contentions. This interpretation has been that it may *not* grant an application without hearing unless it has first found *both* that the granting will serve public interest, convenience or necessity *and* that the granting will not aggrieve or adversely affect the interests of any licensee or pending applicant. Otherwise, it has designated the application for hearing and has regularly permitted interested parties (including licensees of existing stations and pending applicants having only an economic interest) to participate. Its *regular* practice since February, 1931, has been to make formal findings in all cases where a controversial hearing has been held and in all cases subject to appeal, whether granting or denying the application.

The hearing required by Sec. 309(a) must be adapted to the consequences that are to follow, and to the attack and the review to which the decision is subject. Even when a statute is not specific in providing for notice and hearing, such requirements will be read into it to make it conform to the demands of due process.

Sec. 309(a) is easily susceptible of the interpretation given it by the Commission until recently. Other sections of the Act cannot be read intelligibly without such an interpretation, notably Secs. 402(b) to (f) governing appeals, Sec. 405 governing petitions for rehearing, and certain provisions in Secs. 4(j), 5(e) and 409(a), (c) to (e). The legislative history of Sec. 309(a) contradicts any such intention by Congress as Petitioner now imputes to it. Petitioner's suggestion that aggrieved persons should resort to original suits in courts of competent jurisdiction is disingenuous.

Extensive as is the federal regulatory power over radio communication, reaching even to the power to forbid engaging therein and severely to restrict those who are permitted to engage therein, it must still be exercised consistently with the requirements of due process of law.

4. The consideration by the Commission of confidential reports and memoranda in reaching a decision in the instant case deprived respondent of the full and fair hearing to which it is entitled under Sec. 309(a) of the Act and the due process clause in the Fifth Amendment to the Constitution.

ARGUMENT.

I.

It Was the Duty of the Commission, in Passing Upon the Application for Construction Permit for a New Station in this Case, to Take into Account the Ability of the Community to Support an Additional Station.

"Public interest, convenience or necessity" is the substantive law of Title III of the Communications Act of 1934, prescribed by Congress to guide the Federal Communications Commission

a) in the exercise of its principal delegated legislative powers enumerated in Sec. 303, and

b) in granting or denying various kinds of applications for permits and licenses under Secs. 307(a), 309(a), 310(a) and (b), 319 and 325(c), and in compulsory modification of licenses under Sec. 312(b).[1]

The question as to what persons were intended by Congress to have the right to participate in the process by which the substantive law is interpreted and applied, either before the Commission or in the reviewing courts, *is a separate question*, to be considered under the next heading.

(a) *Analysis of the Issue in the Light of the Standard.*

As applied to the regulation of radio communication, "public interest, convenience or necessity" began life in 1927 as a relatively shapeless nebula. Its outer contours were defined by this Court in 1933, as follows:

[1] It is assumed that no significance attaches to the several variations in the wording of the standard as it appears in these sections. Separate consideration need not be given to Sec. 312(b). It was introduced into the statute in 1934, having no counterpart in the Radio Act of 1927, and has virtually never been employed. It is logically grouped with revocations of license, covered by Sec. 312(a).

> "In granting licenses the Commission is required to act 'as public convenience, interest or necessity requires.' This criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power. * * * The requirement is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character and quality of services, and, where an equitable adjustment between States is in view, by the relative advantages in service which will be enjoyed by the public through the distribution of facilities. * * *"[2]

It remained (and still remains) to give more definite shape and content to the nebula by a gradual process of subdividing and resolving it into sub-standards, expressed either

(a) in legislative form, by formal regulations, or

(b) by the case method, in which principles or rules are announced from time to time, as required by fact-situations presented by applications.

This important function was entrusted by Congress to the administrative process with the hope and expectation that, through the accumulation of experience and expertness, the Commission would evolve a satisfactory regulatory code. The advantage of having such a standard administered in this way is, as recently pointed out by this Court, that

> "* * * it serves as a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy. * * * Underlying the whole law is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors. * * *"[3]

[2] Federal Radio Commission v. Nelson Bros., 289 U. S. 266, 285.

[3] Federal Communications Commission v. Pottsville Broadcasting Company, decided Jan. 29, 1940.

One of the principal dangers is that the very vagueness of the standard and the supposed complexities of regulation will be used as cloak and justification for official favoritism.

Figuratively, the standard "public interest, convenience or necessity" may be considered to embrace a circular area marked out by Congress on a field representing the total possible extent of radio regulation. The map thus created comprises three zones:

(1) an inner zone of matters which *must* be taken into account by the Commission in its application of the standard;

(2) an intermediate zone of matters which the Commission, in its discretion, and as its experience and expertness dictate, *may* take into account, and

(3) an outlying zone which the Commission may *not* invade.

What matters fall within the inner and the outer zones is to be determined from specific directions given the Commission by Congress in the Act, and from necessary implications and corollaries of the standard deducible from the context and other trustworthy sources. The administrative agency's errors of commission and omission with respect to these two zones raise questions of law reviewable on appeal.

The intermediate zone, however, is one of administrative discretion in which sub-standards formulated by the Commission, even though having the force of law, will not ordinarily be set aside by the courts because of doubts as to the wisdom of the Commission's determinations. To enjoy immunity from judicial scrutiny, however, the sub-standards must be applied in good faith and with uniformity during the period in which they are in effect. They must *not* be devices to be employed or disregarded at the whim of the Commission, to justify a given result in one case and to permit a contrary result in others. Otherwise, the

power of the reviewing court to correct arbitrary and capricious deteminations may be invoked.

For the first time in the history of this case, and contrary to an administrative interpretation extending back at least to early in 1929, the Commission now contends that, in applying the standard of "public interest, convenience, or necessity", it has no power to do what it has done for years, or to do what to a large extent (although incompletely) it did in this case, namely, to consider whether adequate economic support is available for an additional station in a given community. In other words, it asserts that overnight this has become a matter falling within the outer zone.

In reply, respondent states that the matter must be regarded as either

a) falling within the inner zone and requiring the Commission's attention, or

b) falling within the intermediate zone and presenting so clear an instance of arbitrary and capricious conduct as to call for correction.

This is on the assumption that, at this late stage in the proceedings and on the record now before the Court, the Commission has any standing to raise the issue.

(b) *Petitioner's Standing to Raise the Issue.*

In this case, as shown by the record, the Commission stamped the issue as legitimate from the outset,

a) by granting respondent's petition to intervene in the proceedings before it, the petition being based on apprehended economic injury (R. 22, 24),

b) by permitting respondent fully to participate in the proceedings and, without objection from either Commission counsel or counsel for the applicant, to develop evidence on the issue.

c) by partial (but incomplete) recognition of the issue in its decision (R. 408) and by failure to disclaim the issue therein, although explicitly presented to it by the record,

d) by confining its motion to dismiss respondent's appeal to the ground of alleged tardiness,[1]

e) by confining its argument on the merits in the court below to the contention that respondent did not have an appealable interest because it had "failed to prove its alleged economic injury" (Appendix C, p. 112),

f) by confining its argument on motion for rehearing in the court below to the contention that respondent had no appealable interest but at the same time stating to the court the following:

> "We do not wish to minimize the importance of a consideration by the Commission of the effect of competition between a proposed new station and existing stations before the Commission grants a license for the proposed new station. Unquestionably, the Commission should, in determining whether the 'public interest, convenience and necessity' will be served by the licensing of a new station in a community, give careful and painstaking consideration to the question of whether the effect of granting the new license will be to defeat the ability of the holder of any one or more outstanding licenses to carry on in the public interest. The Commission is entirely in accord with the view that if the effect of granting a new license would be to defeat the ability of the holder of an outstanding license to carry on in the public interest, the application for the new station

[1] Appendix C, p. 110. The Commission's contention on this point was disposed of by the Court of Appeals while this case was pending, in Saginaw Broadcasting Co. v. Federal Communications Commission, 96 F. (2d) 554; Southland Industries, Inc. v. Commission, 99 F. (2d) 117; Woodmen of the World v. Commission, 99 F. (2d) 122.

should be denied unless there are 'overweening' reasons of a public nature for granting it. And the Commission also believes that it is obviously a stronger case where neither licensee will be financially able to render adequate service. It is the Commission's endeavor to determine in every case whether service to the public will be benefited or adversely affected by its action on an application.

"It is also the Commission's position that whenever the Commission, in considering an application for a new station does not so apply the standard of public interest, convenience and necessity as required by the statute, this court, *upon an appeal properly taken*, may and should set aside the decision of the Commission. * * *"

We submit that the Commission, having at all times fully agreed with the lower court's interpretation of the law on the substantive side, can not be heard now to complain that the lower court did not adopt a view which was never urged upon it.

As stated by this Court in *Public Service Commission* v. *Havemeyer*, 296 U. S. 506, at p. 519:

"The commission first raised the point in the Circuit Court of Appeals. If worthy of notice, it should have been made when the appeal was taken to the district court. The appeal is in the nature of a suit to have the order adjudged invalid. The petition for appeal is the complaint. The commission answered on the merits. Thereby it admitted respondents' capacity to initiate the proceeding. * * *"

See also *Duignan* v. *United States*, 274 U. S. 195; *Burnet* v. *Commonwealth Improvement Co.*, 287 U. S. 415; *Munich* v. *Gardner*, 292 U. S. 48, and the concurring opinion of Mr.

Appendix C, pp. 113-4. This is the document from which is drawn the partial quotation appearing in footnote 11 at p. 36 of Petitioner's Brief. The same language was presented by the Commission in its brief in the lower court, and was quoted in the court's opinion, in Yankee Network, Inc. v. Commission, decided Aug. 14, 1939, 107 F. (2d) 212, as well as in the opinion in this case (R. 473).

Justice Brandeis in *B. & O. R. Co.* v. *United States*, 298 U. S. 349, at p. 388, wherein he stated:

> "* * * Federal appellate courts will not in civil cases, upon review of the judgment of the trial court, consider any objection not seasonably presented below; and an objection first presented in a petition for rehearing which has been denied is not seasonably presented unless in connection with the denial that objection was specifically passed upon. This rule is of general application. It governs the appellate court's action whether the objection raises a constitutional question, or relates to a matter of lesser dignity. * * *"

(c) *Analysis of the Standard Generally.*

This Court is not called upon to consider or predict the meaning of "public interest, convenience or necessity" in its many legislative and quasi-judicial ramifications, or as applied to the countless situations which conceivably may call for its application. Certain assertions in Petitioner's Brief, however, tend to exaggerate the complexities and the difficulties, and call for comment.

We may agree with petitioner that

> "* * * The essential purpose of the Act is to secure to the public the maximum benefit from the use of available radio frequencies. * * *" (Petitioner's Brief, p. 18)

and that the standard is to be construed accordingly. The radio spectrum is limited and its use must be regulated in order to avoid interference and to assure an orderly and efficient exploitation of its possibilities.

Accordingly, the regulatory agency must be invested with

> a) broad legislative powers such as are conferred by Sec. 303, including the powers to classify radio stations, to prescribe the nature of the service to be rendered by each class, to assign bands of frequencies to the various classes, to determine the location of

classes of stations, to regulate the kind of apparatus used, to make regulations to prevent interference, to establish areas or zones to be served, and to make regulations "to carry out the provisions of this Act," and

b) broad quasi-judicial powers to limit the number of licensees and to select and reject applicants *for those classes of stations and in those bands of frequencies where the demand exceeds the available facilities*, as well as to prescribe the frequency, power, hours of operation, area to be served, and other conditions subject to which a permit or license is granted.

The Radio Act of 1912 failed to invest the Secretary of Commerce with such powers. To remedy these vital defects was far and above the principal reason for the series of bills to amend or replace that statute, beginning early in 1921 and culminating in the Radio Act of 1927. This is uncontrovertably demonstrated by the legislative history of the bills and the statements made in explanation of their meaning and purpose by their managers in both Houses of Congress.[6]

A basic and prerequisite task in this scheme of regulation is to subdivide the radio spectrum into bands of frequencies, and to assign these bands for use by the several kinds of radio services. To a considerable extent this task is performed, not by the Commission, but by general international treaty to which the United States is a party.[7]

It is true that, at first blush, there seems to be a bewildering assortment of radio services or classes of stations (as indi-

[6] See Appendix A, Parts I and IV, and particularly the remarks of Mr. White of Maine and Mr. Dill of Washington at pp. 48-55.

[7] The principal treaty is the International Telecommunications Convention, Madrid, 1932, and the General Radio Regulations annexed thereto, as revised at Cairo in 1938, particularly Art. 7, Treaty Series No. 948.

cated at pp. 19-20 of Petitioner's Brief). On closer inspection they resolve themselves into comparatively few major classes, such as

1. Stations engaged in carrying on public correspondence, by radiotelegraph, radiotelephone, etc.

2. Stations engaged in the dissemination of radio communications intended to be received by the public (e. g., broadcasting), and various auxiliary services.

3. Stations engaged in furthering safety of life and property at sea, in the air, or in connection with emergency services such as police and fire protection, forestry, etc.

4. Stations engaged in carrying on private correspondence, chiefly amateurs, and

5. Stations engaged in experimentation.

Only the first two of the foregoing present any serious problem of limitation in the number of licensees, or of choosing from among an excessive number of applicants, and of these the second (broadcasting) contributes over ninety per cent of the controversies.*

As of June 30, 1939, 63,251 radio station licenses were outstanding. Of these, however, 53,558 were amateur licenses, 3,756 were for radio stations on board ship, 1,824 were in aviation services, 1,536 were in various emergency services, and 372 were experimental. On the other hand, there were only 778 standard broadcast stations, of which 39 were under construction, and 1104 stations engaged in

* This may easily be verified by reference to the Commission's published reports of its decisions, of which 5 volumes covering the period from July 11, 1934 to June 30, 1938 are available.

fixed public or public coastal operation.[9] Only 39 new broadcast stations were authorized in 1938.[10]

With respect to most of these, *no process of selection is involved* and the issuance of licenses is a routine matter. For example, certain bands of frequencies are set aside for amateurs, and all comers who are citizens of the United States and who have passed certain examinations are granted licenses. Similarly, the installation of radio equipment is compulsory by law on ships and on aircraft (with exceptions). In any event, in these and other services, substantial bands of frequencies are reserved for their use and virtually all comers are licensed.

With respect to most applications, the Commission has found it possible to delegate their disposition to members of its staff. For example, the Secretary handles all applications for amateur and ship licenses, and all applications for aircraft licenses or renewal thereof where the applicant has been the holder of a license within the preceding year. A board of four employees of the Commission handles by far the greater portion of the remaining classes of applications.[11]

There is no justification for asserting, therefore, that "public interest, convenience, or necessity" has the same meaning or presents the same problems when applied, for example, to the routine licensing of 53,558 amateurs to

[9] Fifth Annual Report of Federal Communications Commission to Congress, Gov. Pr. Off., 1939, pp. 73-84, 172, 208-9. The figure of 1104 stations engaged in carrying public correspondence really represents a far smaller number of actual stations, due to the practice which obtained at that date of counting each frequency used at each location as a separate station. For example, 800 fixed public "stations" now represent only 86 licenses. As of June 30, 1939 there were only 15 radiotelegraph companies, 4 radiotelephone companies, and 1 company in the fixed public press service, licensed by the Commission.

[10] *Ibid.* p. 172.

[11] Administrative Order No. 2 of the Federal Communications Commission as amended Nov. 8, 1939, effective Dec. 1, 1939. Release No. 37281.

roam at will within broad bands of frequencies, and the far-from-routine issuance of a construction permit to establish a new broadcast station to disseminate radio communications to be received by the public in a single limited and highly congested band of frequencies. The Commission has never considered, and does not now actually consider, that the same test applies.

(d) *Analysis of the Standard as Applied to the Licensing of Broadcast Stations:*

We begin with the knowledge that the standard, because of interference and related considerations, is to be employed in the process of limiting the number of persons who may engage in broadcasting in the band 550 to 1600 kc. and in selecting a few from the many. What standards, deducible from the Act, will serve as a basis for choice? The whole field of sub-standards available within the framework and limitations dictated by scientific facts and principles may be summarized as follows:

1. Those designed to bring about compliance with the mandate in Sec. 307(b) that

> "* * * the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.";

2. Those designed to insure good service through the stability resulting from taking economic factors into account;

3. Those designed to sift competing applicants on the basis of

> a) character and other qualifications (excluding alien interests and persons adjudged guilty of violation of the anti-trust laws),

b) past or proposed compliance with technical standards, and

c) past or proposed program service.

Congress appears to have excluded 3(c) from the scope of the Commission's regulatory power, by denying to the Commission "the power of censorship over the radio communications or signals transmitted by any radio station."[12] In any event, neither it nor the other tests suggested in the third group are of importance in this case, since the situation is not one of two or more applicants competing for the same facility.

The importance of the first group of sub-standards cannot be over-stated. One of the principal complaints voiced in Congress in the debates preceding enactment of the Radio Act of 1927 was that, due to the inadequacies of the prior statute, an inequitable geographical distribution of stations, with excessive grouping in certain centers and insufficient facilities in others, had developed.[13] This complaint found expression in the mandate to the licensing authority contained in the second paragraph of Sec. 9[14] of the Radio Act of 1927 in which appears substantially the same language as in Sec. 307 (b) in its present form. The belief in Congress that during its first year the Commission had failed to perform its duty resulted in the more rigid and detailed mandate in the amendment of March 28, 1928.[15] This amended section, with a slight modification, was carried forward into Sec. 307(f) of the Communications Act of 1934 but, by amendment on June 5, 1936, the original,

[12] Sec. 326. For expression of Congressional intent as to the scope of this section, see Appendix A, IV, 3, p. 55.

[13] See remarks of Mr. White, Appendix A, IV, 2, pp. 49, 51, and of Mr. Dill, p. 52.

[14] 44 Stat. 1166.

[15] 45 Stat. 373. It was this amended Sec. 9 of the Radio Act of 1927 which was before this Court in Federal Radio Commission v. Nelson Bros., 289 U. S. 266, 269, 270.

more flexible, language was restored. For a long period, during which the rigid and detailed mandate was in effect, the Commission maintained an elaborate set of regulations, known as the quota system,[16] to give it effect. It now has no regulations or sub-standards of any description *other than economic* which purport to give form or context to the present law.

Some sub-standards must, however, be consciously or unconsciously applied if the clear intent of Congress is to be carried out. Otherwise, because of inexorable technical limitations, the improvident grant of too much to one State or community will prevent another State or community from having its fair and equitable share. The Commission probably has its choice of several theories on which to premise sub-standards, any one of which, if fairly applied, would not be disturbed by the courts. One of these would be strict observance of comparative populations involved, perhaps a formula in which weight is given to both population and area. Another, equally legitimate, it is submitted, is the economic ability of the community and its environs to support a given amount of broadcast facilities. The logic of this latter alternative is supported by the fact that, under Sec. 307(b), the prescribed distribution must be not only fair and equitable, but *efficient;* by the fact that a city of a given population lying in an area economically tributary to one or more larger cities and receiving service from stations located in those cities affords less support than a city of the same population which is itself the center of such an area; and by the actual present distribution of stations. The foregoing is not abstract logic. The Commission's recent report to Congress, under the heading of "Further Study of Service Rendered by Standard Broadcast Stations," and the sub-heading "Geographical Distribution of Facilities," after quoting Sec. 307(a) and (b), states:

[16] *Ibid.*, pp. 272-3, 280-1.

> "The evidence shows that different cities have different shapes and sizes, as well as variations in the ability to support transmission facilities, and therefore it is believed that the best method of obtaining equitable distribution to various communities within a State is to adopt a general rule that if a facility is to be licensed in a community, it should be adequate to serve that community and its sphere of economic and social influence. The criterion of whether a certain class of station should be assigned to a particular community must include a consideration of the ability of the community and its social and economic sphere of influence to support a radio station in such a manner that it can render efficiently a good service."[17]

It further appears:

> "There are now 379 cities and towns in the continental United States which have only 1 radio station"

and 88 towns having a population above 25,000 (including several having a population over 100,000), and not located within any metropolitan district, having only one station. There are 12 towns having a population in excess of 25,000, and 101 having a population between 10,000 and 25,000 that have *no stations*.[18]

Some light on the question is furnished by the debates in Congress. The chief point of dispute between the House and the Senate in 1926 was whether the licensing authority should, in the first instance, be the Secretary of Commerce

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[17] Fifth Annual Report of the Federal Communications Commission to Congress, p. 182. A footnote states that the material under the heading was compiled from the "Report of the Committee on Proposed Rules and Regulations Governing Standard Broadcast Stations, April 1, 1939." *Ibid.*, p. 175. We invite the Court's attention further to Appendix B in which, at great length, "Financial and Other Statistical Data relating to Standard Broadcast Stations" is set forth by tabulation and chart. *Ibid.*, pp. 210-284.

[18] *Ibid.*, 178-180. Dubuque has a population of 41,679 (R. 410) and the area receives a measure of service from a number of stations located in other cities (R. 398).

or a commission. Senator Dill, the proponent of the latter view which ultimately prevailed, stated in support of his thesis that the commission

> "* * *, should be composed of men * * * who will administer the law from the standpoint of the public's interest, and particularly with a view to the future development of the radio art for the social and economic good of our people * * *."

He opposed giving the authority to the Secretary of Commerce because

> "* * * he does not and he cannot give consideration to these great problems affecting the economic and social life of the country * * * and then to provide, as the bill provides, fair, efficient, and equitable radio service. * * *" (Appendix B, pp. 53, 54)

In the House, Mr. White, in calling attention to the excessive congestion of stations in certain cities, stated:

> "* * * Stations so centered detract from the value of each other and interfere with the highest quality of service. * * *" (*Ibid.*, p. 51)

Independently of Sec. 307(b), there is evidence in that Act that the Commission is to take the economic factor into account in interpreting and applying the standard "public interest, convenience or necessity".

First, may be mentioned the standard itself. It has an obvious public utility history and connotation. This, we concede, is not compelling so far as broadcasting is concerned, in view of Sec. 3(h).[19] It *is* important in that "public interest, convenience, or necessity" as used in Title III must be deemed to import the same meaning as Sec.

[19] Sec. 3(h), after defining "common carrier" or "carrier", provides that "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier".

214(a)[20] in Title II as applied to applications by radio communication carriers for new or modified licenses representing the equivalent of new lines or extensions of lines. Otherwise, the basic purposes of Title II would be completely thwarted. We mention this as indication that the standard in Secs. 307(a), 309(a) and 319 has a full economic content when applied to radio stations engaged in carrying public correspondence for hire; and, in such cases, is not amenable to the narrow scope ascribed to it in Petitioner's Brief.[21]

Secondly, may be mentioned the very significant requirement in Secs. 308(b) and 319(a) that all applications

> "'shall set forth such facts as the Commission by regulation may prescribe as to the * * * financial * * * ability of the applicant to construct and operate the station.'"[22]

It will not be contended that by this language Congress meant to award radio licenses to the wealthiest applicants in every case where a choice is to be made between two or more applicants. "Financial responsibility" must have a

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[20] Sec. 214(a) makes "a certificate that the present or future public convenience and necessity require or will require, etc." prerequisite to the construction by a carrier of a new line or of an extension of any line, etc. By its terms it applies only to wire carriers, although Title II as a whole applies to wire and radio carriers alike.

[21] See Mackay Radio & Telegraph Co. v. Federal Radio Commission, 97 F. (2d) 641, an appeal from a decision of the Commission reported in 2 F. C. C. 592, in which the Commission denied applications of the Mackay Co. for modification of its fixed public service licenses of point-to-point telegraph stations to add Oslo, Norway, as a primary point of communication. The Commission held that the proposed new circuit, while increasing the revenues of applicant, would decrease the revenues of all other established competing carriers and would decrease the total revenues of the American owned companies. On appeal, the Commission vigorously and successfully upheld its reasoning.

[22] Sec. 319(a). Sec. 309(a) substitutes "qualifications" for "ability" and "operate" for "construct and operate".

meaning more consonant with a sound public interest. The applicant of modest means should also be eligible upon a showing that, with the economic support that may reasonably be expected for his proposed station, he will be able to construct and operate it successfully. If this be of concern to the Commission, in order not to confine radio privileges to the wealthy, then it must also be the Commission's concern that the premise upon which such a license was granted be not undermined by later action which in effect gives the license to the wealthier person.

Such considerations are particularly relevant in a case such as is now presented to this Court. The Telegraph-Herald Co. publishes the only non-sectarian newspaper in Dubuque. It strenuously opposed the original establishment of respondent's station in the Dubuque area, and unsuccessfully appealed from the Commission's original grant.[23] It consistently refused to carry WKBB's programs in its newspaper, although publishing daily and without charge programs carried by stations in other cities (R. 388). In the present situation, there is at least competition between the newspaper and the radio station for audience and for advertising. If the Telegraph Herald should be awarded a license for a second station, and if, as the evidence indicates, the Dubuque area will not support a second station, the result will be a concentration of ownership of *both* means of mass-communication in one concern.

Petitioner's Brief argues implications drawn from Secs. 311 and 313 of the Act. On their face, the scope and purposes of these sections are so foreign to the situation now before the Court, that argument seems superfluous.[24] Petitioner overlooks the fact that to inflict excessive competition in broadcasting on one community is, in view of the

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[23] Telegraph Herald Co. v. Federal Radio Commission, 66 F. (2d) 220. The court held that Telegraph Herald Co., being neither licensee nor applicant, had no appealable interest.

[24] For a discussion of the legislative history and purpose of these sections, see Lovett, The Antitrust Provisions of the Radio Act, 2 Jour. Radio Law 1.

limited total of facilities, either to deprive a larger community somewhere else of adequate competition or to deprive still other communities of any station at all.

For self-evident reasons respondent is unable to cite any decisions of this Court as being directly in point. Title III of the Communications Act of 1934, as applied to broadcasting, is *sui generis*. Any decisions having to do with statutes regulating common carriers may be distinguished on that account and to that extent, just as cases cited in Petitioner's Brief having to do with statutes regulating other very different fields of activity are readily distinguishable. The principal cases, tending to support respondent, all drawn from the public utility field, are sufficiently collected in the lower court's opinion in *Yankee Network, Inc.* v. *Federal Communications Commission*, 107 F. (2d) 212, at pp. 219 and 224.

Considerations drawn directly from the Act itself, in the light of its legislative history and the Congressional intent, lead us to urge that, in applying the criterion "public interest, convenience or necessity" to the establishment of new broadcast stations, the Commission is *required* to take the economic factor into account,—at least in cases such as the present, where the issue was timely and properly raised and the probability of inadequate support is shown by substantial evidence. In other words, we submit, the matter falls within the inner of the three zones to which reference was made at the beginning of this portion of our argument.

If, however, it be determined that this contention goes too far, we submit that the matter at least falls within the second zone, the zone in which the Commission has the power to take the economic factor into account. There is no basis for contending that it lies in a field which the Commission may not invade. Petitioner's warning (p. 32) that our doctrine leads to rate-regulation and program control (*i.e.* censorship) may be met if and when such a case arises.

In either alternative, it becomes important to examine the Commission's administrative interpretation of "public

interest, convenience, or necessity" with reference to the economic factor. If it is demonstrated, as we believe it is under the next sub-heading, that the interpretation for which we contend prevailed for a period of years under the Radio Act of 1927, the re-enactment by Congress of the same phraseology in the Communications Act of 1934 may be deemed to import into the statute the meaning which the criterion had had in practice.[25] If the matter be regarded as falling within the second zone, but the Commission has persistently adhered to a given sub-standard for years, departing from it only in this or at most a few isolated cases, only to return to the same sub-standard in other cases, its action in this case must be regarded as arbitrary and capricious, and beyond the power delegated to it by Congress.

> "* * * The Commission's error arose from a failure to recognize that when it prescribed a maximum reasonable rate for the future it was performing a legislative function, and that when it was sitting to award reparation it was sitting for a purpose judicial in its nature. In the second capacity, while not bound by the rule of *res judicata*, it was bound to recognize the validity of the rule of conduct prescribed by it and not to repeal its own enactment with retroactive effect. It could repeal the order as it affected future action, and substitute a new rule of conduct as often as occasion might require, but this was obviously the limit of its power, as of that of the legislature itself."[26]

In the light of the position taken by the Commission in the lower court, *i.e.*, that it has the power to take the ability or inability of a community to support an additional station into account but that parties adversely affected by its so doing have no standing to question its decisions, we are justified in concluding that what the Com-

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[25] See cases cited in Petitioner's Brief, p. 34.

[26] Arizona Grocery Co. v. Atchison etc. R. Co., 284 U. S. 370, 389.

mission is actually seeking is an uncontrolled discretion in applying the standard. This conclusion is fortified by the knowledge that, as pointed out by the court below in *Yankee Network, Inc.* v. *Commission*, 107 F. (2d) 212, the Commission

> "expanded its contention to include any possible grievance or affectation of interest, electrical, economic or otherwise". (p. 214)

(c) *The Commission's Administrative Construction of the Standard.*

In the light of the actual facts, the repeated assertion in Petitioner's Brief (at pp. 12 and 34) that our contention is contrary to the administrative interpretation placed upon the statute by the Commission is at least surprising, particularly when coupled with the implication that Petitioner's interpretation has prevailed over the years. It has forced upon us the burden of proving a negative, at the expense of a bulky Appendix B (pp. 59-109) in which the accuracy of Petitioner's assertion is, we believe, completely demolished.

The Commission's expression, in a decision rendered as recently as January 10, 1940, quoted at length in Petitioner's Brief (pp. 30-31), is extremely revealing, principally in that, at this late date, the Commission should have deemed it necessary or advisable to make public its supposedly well-established views on the subject-matter, and to have issued a press release on the subject.[27] No earlier instance of any pronouncement even remotely parallel to this recent expression is cited and, with inconspicuous and isolated exceptions to which attention is called in Appendix B, none can be. It would be expected that at least something more than a pronouncement made while this case is pending in Court would be produced to support so broad a claim.

[27] Press Release 38427, Jan. 9, 1940.

We meet first Petitioner's challenging declaration that the Commission (including its predecessor) has

> "never denied a license to one otherwise qualified on the ground that his competition may injuriously affect an existing license". (p. 34)

Precisely such a case was *In re Fall River Herald News Publishing Co.*, 5 F. C. C. 377, 381, 382, decided May 11, 1938, some ten months after the decision in the instant case. The recitals of fact as set forth in the two decisions are so nearly identical that they have been arranged in parallel columns in Appendix B (pp. 85-89). The Commission's findings in the *Fall River* case included the following:

> "* * * There is nothing in the testimony before the Commission to encourage the belief that two local broadcast stations in Fall River would find sufficient financial support to sustain themselves, nor that the existing station could survive the reasonably expected rivalry of the Fall River Herald News Publishing Company, and since the performance of the existing station is acceptable and sufficient the application for permit to construct another station should be denied."

Its "Grounds for Decision" included the following:

> "The record does not show that sufficient commercial support could be reasonably expected to enable the existing station to continue its operations and at the same time to sustain the applicant in its proposed operations."

It is obvious from the face of the decision that the foregoing was the principal ground relied upon.

In an early decision of the Federal Radio Commission, rendered January 31, 1929 (*Richmond Development Corp.*, Docket 246, not reported), the same result was reached on reasoning tied in with the requirement of fair and equitable distribution (Appendix B, pp. 79-80). The same reasoning again appears in the Commission's most recent re-

port to Congress.[28] Over the years, a large number of decisions have been rendered first by the Federal Radio Commission and later by the present Commission, in which the issue was accepted as legitimate and was decided in the light of the facts, although in most cases favorably to the applicant (Appendix B, pp. 80-85, 89-92). The same or analogous economic considerations have entered into many decisions involving the Commission's consent to transfers of license under Sec. 310(b), and actions on applications for permits to "export" programs under Sec. 325(b) and (c) (Appendix B, pp. 92-96).

The most signal instance of giving effect to the economic factor, however, remains to be cited. As pointed out in the Commission's most recent report to Congress, 38.5 per cent of the total land area of the United States (containing a 1930 population of nearly 10,000,000) does not receive satisfactory primary service in the daytime from even one broadcast station, while at night 56.9 per cent of the area (containing a population of over 21,000,000) does not receive such service from even one station. The areas receiving satisfactory service from more than one station are materially less. Yet the Commission, by its legislative determinations under Sec. 303 during 1939, has barred the way to the sole method of achieving any substantial betterment of these conditions, namely, by permitting clear channel stations to increase their power in excess of 50 kw. Amendment of its regulations to permit the increase, unobjectionable from the point of view of interference or other technical considerations, was rejected principally, if not solely, because of apprehended competitive effects on other classes of broadcast stations (Appendix B, pp. 97-106).

Similarly, economic factors have played an impressive role in the formulation of the Commission's regulations governing international broadcasting and television (*Ibid*;

[28] Fifth Annual Report of Federal Communications Commission, Nov. 15, 1939, p. 182, quoted under the previous subheading.

pp. 104-106), and in the exercise of its inquisitorial functions with respect to broadcasting (*Ibid.*, p. 107).

With this record of actual performance as background, we may note the actual present inclination of the Commission to visit retribution on those who raise an issue heretofore regarded as proper for over ten years. On February 6, 1939, the Commission granted a construction permit to the Kentucky Broadcasting Corporation to establish a local station at Louisville, Kentucky. On October 10, 1939, while this station was in course of construction, the Commission, without hearing, granted an increase in hours of operation from daytime to limited time to a station of comparable power and classification at New Albany, Indiana, across the Ohio River. On October 30, 1939, the Kentucky Broadcasting Corporation petitioned for a rehearing on the New Albany decision, alleging that it would result in such severe loss of revenue as to impair the petitioner's service, and would destroy its ability to render proper service in the public interest. On November 20, 1939, the Commission not only denied the petition for rehearing, but, after reciting that "such allegations cast serious doubts upon the petitioner's financial qualifications to construct and operate its proposed station", it issued an order requiring the Kentucky Broadcasting Corporation to show cause, on or before December 5, 1939, why its construction permit should not be recalled.[29]

A fitting anti-climax to the foregoing is furnished by the fact-situation and contentions submitted to this Court within the past month by the Commission itself. In *Fly* v. *Heitmeyer*, decided January 29, 1940, the "two other applications for the same facilities" referred to in the Court's opinion were in reality simply two other applications for a station in the same city, one of them for the same frequency assignment and the other for an entirely different assignment, involving no interference question and no com-

[29] Federal Communications Commission Release No. 37603, Nov. 20, 1989.

petitive aspect other than economic. The other application for the same frequency assignment, however, was withdrawn *prior* to the date on which Heitmeyer resorted to the District Court to compel compliance with the mandate.[30] Nevertheless, as indicated in the Court's opinion, the remaining two applications, although for different facilities, were treated as "rival applications" and the Commission's proposal, complained of on appeal, was to reopen the record and to take new evidence on their comparative ability to satisfy the standard. The Commission has, therefore, sought and obtained a favorable result in this Court to try, in major measure at least, an issue which it now urges it has no power to consider.[31]

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[30] See the Commission's brief in this Court in Fly v. Heitmeyer, p. 5. Actually, the Commission's notices of hearing, reopening the proceedings, were dated April 29, 1938; the other application for the same facilities was withdrawn May 17, 1938; and Heitmeyer instituted his proceedings in court May 31, 1938. The decision of the Court of Appeals, reversed by this Court, was rendered May 24, 1939.

[31] In its brief filed in this Court in Federal Communications Commission v. Pottsville Broadcasting Company, decided Jan. 29, 1940, the Commission stated the following:

> "* * * The judgment of accountants and financial experts is needed to ensure that a portion of the radio broadcast spectrum is not being appropriated by an applicant who is financially irresponsible or whose probable revenues are so insufficient that the venture cannot be sanctioned. * * * (p. 29)
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> * * * * * *
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> "We have shown (*supra*, pp. 29-30) that the Commission's consideration of an application for a construction permit or a station license requires the solution of a number of engineering, economic, social, and other problems. * * *" (p. 38)

II.

Respondent Has the Right to Appeal Under Sec. 402(b)(2).

Sec. 402(b) (2) provides for an appeal

> "By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application."

Obviously, Congress intended that *some* class or classes of persons have the right to appeal from a Commission decision granting an application for a construction permit. An intent to produce an absurd, ineffective, or inefficient result may not be imputed. *United States* v. *Powers*, 307 U. S. 214. Petitioner contends for such a result when it asserts only those may appeal "who suffer legal aggrievement or whose legal interests are affected by the Commission's action" (Brief, p. 38), meaning, apparently, to confine the right of appeal to those who at common law, or independently of the Communications Act, would have the right to resort to the courts, and to exclude even licensees whose existing stations would be adversely affected by interference.

Petitioner's alternative contention (if we understand correctly) is that the description "any other person aggrieved or whose interests are adversely affected" is somehow subject to and bounded by the criterion "public interest, convenience or necessity". It is nowhere made so by the statute. The right to participate in a legal controversy to oppose a certain result depends, it is true, upon threat of injury to the participant, but the nature of the injury does not limit or define the substantive issues, nor do the latter necessarily limit or define who is injured.

(a) *Petitioner's Standing to Raise the Question.*

Petitioner granted respondent's petition to intervene on the ground of apprehended economic injury (R. 24), under procedural regulations which limited intervention to parties

having "a substantial interest in the subject matter of the hearing" (Appendix B, p. 74). It permitted respondent thereafter fully to participate in the proceedings on *all* issues, and later to file a petition for rehearing under Sec. 405. It failed to urge lack of appealable interest, in its motion to dismiss (Appendix C, p. 110), and first raised the point now presented in its petition for rehearing on the lower court's decision (*ibid.* p. 111). See *Public Service Commission* v. *Havemeyer*, 296 U. S. 506, 519; *B. & O. R. Co.* v. *United States*, 298 U. S. 349, concurring opinion of Mr. Justice Brandeis at p. 388; *Duignan* v. *United States*, 274 U. S. 195; *Burnet* v. *Commonwealth Improvement Co.*, 287 U. S. 415; *Minnich* v. *Gardner*, 292 U. S. 48.

In the *Chicago Junction Case*, 264 U. S. 258, at p. 268, this Court stated:

> "The plaintiffs may challenge the order because they are parties to it. The Judicial Code, § 212 (originally the Commerce Court Act, June 18, 1910, chap. 309, 36 Stat. at L. 542, Comp. Stat. § 1005), declares that any party to a proceeding before the Commission may, as of right, become a party to 'any suit wherein is involved the validity of such order.' The section does not in terms provide that such party may institute a suit to challenge the order. But this is implied. For, otherwise, there would in some cases be no redress for the injury inflicted by an illegal order. Moreover, the fact of intervention, allowed as it was, implies a finding by the Commission that the plaintiffs have an interest. In the proceeding before the Commission, they opposed by evidence and argument the granting of the application. This they did as of right. For under the rules of practice, adopted by the Commission pursuant to Par. 1 of § 17 of the Interstate Commerce Act, the intervener becomes a party to the proceeding, entitled, like any other party, to appear at the taking of testimony, to produce and cross-examine witnesses, and to be heard in person or by counsel. The intervention must be preceded by an order of the Commission granting leave; and leave can be granted only to one showing interest. No case has been found in which either this court, or any lower court, has denied to one who

> was a party to the proceedings before the Commission the right to challenge the order entered therein. • • •"

See also *Youngstown Sheet & Tube Co.* v. *United States*, 295 U. S. 476, 479.

(b) *The Context.*

The description in Sec. 402(b) (2) appears in two other provisions of the Communications Act and, by a long-continued process of administrative construction dating back to May 26, 1927, has been read into another. The provisions are Secs. 402(d) governing intervention in appeals, Sec. 405 governing petitions for rehearing before the Commission, and Sec. 309(a) governing hearings before the Commission.

Much of Petitioner's reasoning is traceable to an excessively literal reading of Sec. 309(a). Since separate questions of statutory construction, of administrative interpretation, and even of validity are involved, we shall reserve it for separate discussion under Part III.[1] At this juncture we shall confine ourselves to observing that under a series of codifications and revisions of its regulations governing practice and procedure, dating back to June 25, 1930 (and actually back to May 26, 1927), until August 1, 1939, the Federal Radio Commission and the present Commission continuously maintained in force a provision in substance as follows:

> "104.6. In cases where the application is proper upon its face but the Commission is unable to determine, without a hearing on the merits, that the granting of such application, either in whole or in part, would serve public interest, convenience, or necessity, and that the granting of such application, either in whole

[1] The same applies to the several other provisions in the Act showing the intent of Congress that the right to participate in the original hearings before the Commission be liberally accorded to interested persons.

> or in part, *would not aggrieve or adversely affect the interests of any licensee, or any person having a pending application*, the Commission will designate the same for hearing and the following procedure will govern: * * * "[2] (Italics supplied)

During the entire period licensees of existing stations apprehending economic injury were regularly permitted to participate either as respondents or as intervenors. Congress, by Sec. 604(a) of the Act,[3] provided that the regulations of the Federal Radio Commission should continue in effect until modified or repealed. How does Petitioner construe the language "aggrieve or adversely affect the interests" in the Commission's own regulations?

Sec. 405 provides that application for rehearing of a decision, order or requirement under Title III

> "* * * may be made by any party or any person aggrieved or whose interests are adversely affected thereby. * * * "

and that

> "* * * In case a rehearing is granted, the proceedings thereupon shall conform as nearly as may be to the proceedings in an original hearing, except as the Commission may otherwise direct; and if, in its judgment, after such rehearing and the consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly. * * * "

Does Petitioner claim that the above description in Sec. 405, couched in almost identical language with that in the appeal section, is confined to

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[2] Appendix B, pp. 72-3. The above represents the precise language which was in effect from Dec. 18, 1935 until Jan. 11, 1939, during which period the proceedings in this instant case were pending before the Commission.

[3] Appendix B, p. 72.

"those persons who, in the absence of this provision, would be entitled to bring an original suit in a court of competent jurisdiction"?

To state the question is to answer it.

Petitioner regularly overlooks Sec. 402(d) of the Act which provides that "any interested person may intervene and participate in the proceedings had upon said appeal" and defines an interested person as

> "* * * Any person who would be aggrieved or whose interests would be adversely affected by a reversal or modification of the decision of the Commission complained of * * *."

This language is obviously not confined to applicants; otherwise, Congress would have enacted an appropriate definition for that purpose. It would be interesting to know how Petitioner applies its theory to this provision. We find it impossible.

(c) *Immediate Source of the Statutory Description—Sec. 5 of the Radio Act of 1927.*

Sec. 5 of the Radio Act of 1927[4] provided in part:

> "Any person, firm, company, or corporation, any State or political division thereof aggrieved or whose interests are adversely affected by any decision, determination, or regulation of the Secretary of Commerce may appeal therefrom to the Commission * * *."

The phraseology in the foregoing was the immediate source of the description used in the amended Sec. 16 enacted July 1, 1930, which, with unimportant modifications, became Sec. 402(b) to (f) of the Communications Act of 1934.

Under the Radio Act of 1927, as originally enacted, after the first year the Secretary of Commerce was to become the licensing authority and the commission a sort of ad-

[4] Appendix A, pp. 36-37.

ministrative court of appeals. For reasons explained elsewhere[4] this arrangement never went into effect. The full scope of the right of review conferred by Sec. 5 cannot be appreciated without reading it in full, but some indication of its breadth is given by the mandate to the Secretary of Commerce to refer to the Commission

> "* * * any application for a station license or for the renewal or modification of any existing station license as to the granting of which dispute, controversy, or conflict arises or against the granting of which protest is filed * * * by any party in interest. * * *"

Sec. 5 itself has an interesting legislative history.[5]

(d) *Legislative History of Sec. 402(b)(2).*

The legislative history of the Radio Act of 1927 reveals a growing momentum toward adequate appeal provisions for *all* interested parties, intensified by the complete lack of any such provisions in the Radio Act of 1912.[6] Notwithstanding efforts to accord the right to persons "interested in or aggrieved by any decision granting or refusing a license",[7] Sec. 16 of the Radio Act of 1927, as finally passed, gave the right only to rejected applicants.[8]

Its obvious defects became apparent as soon as appeals began to be taken from decisions of the Federal Radio Commission, particularly its failure to recognize the rights of persons adversely affected either by the Commission's granting of an application or as the result of the reviewing court's decision reversing the Commission. A number of clumsy and circuitous methods of getting before the court were resorted to, and the validity of Sec. 16 itself was un-

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[4] Appendix A, pp. 8-10.
[5] Appendix A, pp. 5, 19-21.
[6] Appendix A, pp. 12-22.
[7] *Ibid.* pp. 18, 20.
[8] This section is set forth in full in Appendix A, p. 13.

der attack.[10] Consequently, both because of this defect and because the administrative status of the reviewing court did not permit review by the Supreme Court, Congress amended Sec. 16 by the Act of July 1, 1930 (46 Stat. 844). In the course of the debate preceding the enactment, Mr. Davis, who was one of the managers of the bill in the House and who had urged a more liberal appeal provision in 1926, after pointing out that certain other provisions "insured any interested party the right to be heard" said:

> "* * * The same is true with respect to the right of appeal to the courts. Any party aggrieved is given the right of appeal to the court."[11]

During the next four years two efforts were made to limit the persons having the right of appeal, both of which were rejected by Congress. In opposing one of them, Senator White stated:

> "* * * But whatever it means, it is a limitation upon the present right of appeal, for the present right of appeal is among others to any person adversely affected by a decision of the Federal Radio Commission. * * *"[12]

(c) *Effect of Re-enactment of the Amended Sec. 16.*

By the time Congress re-enacted (substantially) the amended Sec. 16 of the Radio Act of 1927, there had been a number of decisions giving scope to Sec. 402(b)(2).

In *Journal Company* v. *Commission*, 1931, 48 F. (2d) 461, the licensee of an existing station in Milwaukee appealed from a decision rendered by the Commission without hearing, according an increase in power to a station in Maine and a shift of stations in Florida on the same frequency, and thus causing interference to the Milwaukee station.

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[10] Appendix A, pp. 22-25.

[11] Appendix A, p. 28.

[12] Appendix A, pp. 29-32, at p. 31.

The Journal Company took appeals both before and after enactment of the amendment. The court stated:

> "* * * Under the Act of 1927 no appeal was allowed in such circumstances. Recognizing this apparent defect in the statute, Congress in the Act of July 1, 1930 (46 Stat. 844 [47 USCA § 96], amending section 16 of the 1927 Act, provided for appeals by 'any other person, firm, or corporation aggrieved or whose interests are adversely affected by any decision of the commission granting or refusing any such application, or by any decision of the commission revoking, modifying, or suspending an existing station license.' * * * "

It reversed the Commission, holding the latter in error in its actions "without notice to appellant and an opportunity to be heard." (p. 464)

In several other cases during the period 1930-1934, appeals were taken from Commission decisions *granting* applications by parties adversely affected (a) by interference,[13] or (b) by economic injury.[14] No one questioned the rights of these appellants to avail themselves of the appeal provided by Sec. 402(b)(2). After 1934, there were further appeals of the same character.[15]

The re-enactment by Congress of the phraseology of Sec. 402(b)(2), after and in the light of decisions such as the *Journal Company* case (*supra*) and *Woodmen of the World* v. *Commission*, 65 F. (2d) 484, tends to show that Congress intended that "any person aggrieved or whose interests are affected" should include the licensees of existing stations affected by either interference or competitive economic injury. *Heald et al. v. District of Columbia*, 254 U. S. 20; *Latimer* v. *United States*, 223 U. S. 501.

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[13] Unity School v. Commission, 1933, 64 F. (2d) 550; WREC, Inc. v. Commission, 1933, 67 F. (2d) 578 and Unity School v. Commission, Feb. 19, 1934, 69 F. (2d) 571.

[14] Woodmen of the World v. Commission, 1933, 65 F. (2d) 484; WGN, Inc. v. Commission, 1933, 68 F. (2d) 452.

[15] Head-of-the-Lakes Broadcasting Co. v. Commission, 1936, 84 F. (2d) 396; Eastland Co. v. Commission, 1937, 92 F. (2d) 467, and Pulitzer Publishing Co. v. Commission, 1937, 94 F. (2d) 249.

(f) *The Actual Nature and Extent of the Adverse Effect.*

What are the respects in which, as a matter of fact and not legal theory, the licensee of an existing broadcast station may be aggrieved or his interests adversely affected by the establishment of a new station? There are principally two, (1) interference, if the new station is assigned to the same or a closely adjacent frequency, and (2) economic, if the new station is established in the same community. To have any meaning at all with respect to licensees of existing stations, Sec. 402(b)(2) must include one or both of these types of injury.

The essence of the injury in both cases is *loss of listeners*. A broadcast station is licensed for "the dissemination of radio communications intended to be received by the public".[16] The Commission is given "authority to establish areas or zones to be served by any station".[17] When the station's public is decreased it is adversely affected. The decrease may come about through reducing its interference-free service area from a radius of 30 miles to a radius of 20 miles, in which event all persons within a 10-mile zone cease to be part of its potential audience. Or the decrease may come about through forcing existing stations to divide their potential audience with an additional station, whether it be the second station in a city having only one station or the sixth station in a city having five. In any event, the *actual* decrease in audience may be, and frequently is, far greater through the establishment of a new station in the same community than it is through additional interference. So far as *facts* count, the injury is at least just as great.

Talk of existing stations simply as advertising media is beside the point. The injury is *loss of listeners* and, in the case of commercial broadcast stations, this in turn means loss of favor with advertisers and reduced revenue.

[16] Sec. 3(o) of the Communications Act.

[17] Sec. 303(b) of the Communications Act.

Do persons other than the licensees of existing stations come within Sec. 402(b) (2)? The question is not before the Court. We suggest, however, that the clause extends at least to *other applicants*, including (1) those seeking to establish a station in the same community as that in which the new station is authorized, and (2) those whose applications cannot be granted due to considerations of interference arising from the Commission's grant or whose stations (if their applications are later granted) would suffer from increased interference. If the Commission makes up its mind to establish only one station in a community, competing applicants, even though applying for different frequencies, have very substantial interests in each other's application. This was the real situation in the *Heitmeyer* case, decided by this Court January 29, 1940.

There may be still other classes of persons within the description. For example, Sec. 5 of the Radio Act of 1927 provided for an appeal by "any State or political division thereof", presumably because of the mandate of fair and equitable distribution of broadcast facilities.

Any idea that to accord an appeal to a person in respondent's situation is to expand Sec. 402(b) (2) outside the limits of "case or controversy" would seem to be set at rest by *Federal Power Commission* v. *Pacific Power & Light Co.*, 307 U. S. 156, at p. 159.[18] See *Jones et al.* v. *Rhea*, 130 Va. 345, 107 S. E. 814.

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[18] A search has been made of statutory provisions for appeal from other Federal administrative agencies without, however, producing anything which seems particularly relevant to the issues in this case. Instances of phraseology to describe persons eligible to appeal include the following:

Federal Power Commission: "Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing * * *." 16 U.S.C.A. 8251; 49 Stat. 860.)

Interstate Commerce Commission: " * * any party or parties in interest to the proceeding before the commission, in which

An underlying consideration of sound policy is present. Persons having so substantial an interest in the outcome of such proceedings are bound to give expression and effect to their opposition. Neither a statute nor a court decision can dissipate such an interest by saying that legally it is non-existent. It is far better that an outlet be furnished for open expression of such opposition at public hearing than that its strength be diverted into subterranean channels.

It seems hardly necessary to discuss seriously the disturbing prospect of multitudinous appellants, forecast by Petitioner in the event its view be not accepted. The statute has been in effect almost ten years, and the deluge has not materialized.

> " * * * It is always easy to conjure up extreme and even oppressive possibilities in the exertion of authority. But courts are not charged with general guardianship against all potential mischief in the complicated tasks of government. * * *"[19]

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an order or requirement is made * * *: Provided further, That communities, associations, corporations, firms and individuals, who are interested in the controversy or question before the Interstate Commerce Commission * * * may intervene in said suit or proceedings at any time after the institution thereof; * *." (28 U.S.C.A. 45a; 38 Stat. 220.)

National Bituminous Coal Division: "Any person aggrieved by an order issued by the Commission in a proceeding to which such person is a party may obtain a review * * *." (15 U.S.C.A. 836(b); 50 Stat. 85.)

Securities and Exchange Commission: "(a) Any person aggrieved by an order of the Commission may obtain a review of such order in the Circuit Court of Appeals * *." (15 U.S.C.A. 77i; 48 Stat. 80.)

"(a) Any person aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person is a party may obtain a review * *." (15 U.S.C.A. 78y; 48 Stat. 926.)

United States Maritime Commission: " * * any party or parties in interest to the proceeding before the commission, in which an order or requirement is made * *." (28 U.S.C.A. 45a; 38 Stat. 220.)

[19] Federal Communications Commission v. Pottsville Broadcasting Co., decided Jan. 29, 1940.

III.

The Commission Was Required to Make Findings With Respect to Adequacy of Economic Support.

If our contentions under Point I are correct, the Commission's obligation to make findings on the economic issue seems axiomatic *unless* there is something peculiar about the Communications Act exempting it from well-settled maxims of statutory construction and elementary requirements of due process of law as applied to the administrative process. *Atchison etc. R. Co.* v. *United States*, 295 U. S. 193, 201; *United States* v. *B. & O. R. Co.*, 293 U. S. 454; *State of Florida* v. *United States*, 282 U. S. 194, 215; *United States* v. *Chicago, etc. R. Co.*, 294 U. S. 499; *Beaumont etc. R. Co.* v. *United States*, 282 U. S. 74, 86; *Mahler* v. *Eby*, 264 U. S. 32, 44; *Wichita R. & Light Co.* v. *P. U. C.*, 260 U. S. 48, 58.

The principle has been applied by the United States Court of Appeals to decisions of the Commission from which appeals may be taken under Sec. 402(b). *Saginaw Broadcasting Co.* v. *Commission*, 96 F. (2d) 554; *Missouri Broadcasting Corp.* v. *Commission*, 94 F. (2d) 623, cert. denied, 303 U. S. 655; *Tri-State Broadcasting Co., Inc.* v. *Commission*, 96 F. (2d) 564; *Heitmeyer* v. *Commission*, 95 F. (2d) 91.

The position of the court below on this question was summarized in an opinion by Mr. Justice Stephens, *Saginaw Broadcasting Co.* v. *F. C. C.*, *supra*:

> "The requirement that courts, and commissions acting in a quasi-judicial capacity, shall make findings of fact, is a means provided by Congress for guaranteeing that cases shall be decided according to the evidence and the law, rather than arbitrarily or from extralegal considerations; and findings of fact serve the additional purpose, where provisions for review are made, of apprising the parties and the reviewing tribunal of the factual basis of the action of the court or commission, so that the parties and the reviewing tri-

bunal may determine whether the case has been decided upon the evidence and the law or, on the contrary, upon arbitrary or extralegal considerations. When a decision is accompanied by findings of fact, the reviewing court can decide whether the decision reached by the court or commission follows as a matter of law from the facts stated as its basis, and also whether the facts so stated have any substantial support in the evidence. In the absence of findings of fact the reviewing tribunal can determine neither of these things. The requirement of findings is thus far from a technicality. On the contrary, it is to insure against Star Chamber methods, to make certain that justice shall be administered according to facts and law. This is fully as important in respect of commissions as it is in respect of courts.

* * * * *

"We ruled in Missouri Broadcasting Corporation v. Federal Communications Commission, 68 App. D. C. 154, 94 F. 2d 623, 1937, and again in Heitmeyer v. Federal Communications Commission, 68 App. D. C. 180, 95 F. 2d 91, 1937, that findings of fact in the broad terms of public convenience, interest, or necessity, the criterion set up by Section 319(a) of the Act, were not sufficient to support an order of the Commission. We now rule that findings of fact, to be sufficient to support an order, must include what have been above described as the basic facts, from which the ultimate facts in the terms of the statutory criterion are inferred.

* * * * *

"These decisions show that a reviewing court cannot properly exercise its function upon findings of ultimate fact alone, but must require also findings of the basic facts which represent the determination of the administrative body as to the meaning of the evidence, and from which the ultimate facts flow. Such findings are, we think, just as necessary in cases involving the application of the statutory criterion of public convenience, interest, or necessity set up by the Communications Act, as in those cases which under the Interstate Commerce Act require the application of the standard of unjust discrimination, or in those cases

which under state public utility statutes require the application of the criterion of public convenience and necessity."

Petitioner rests its claim to dispensation on a literal rendition of the language of Sec. 309(a),[1] plus an inarticulate premise that the Commission, in the granting or refusal of radio applications, is purely an executive agency and is accordingly exempt from the requirements of due process. The resulting syllogism runs as follows:

a) The Commission has unlimited discretion to grant any of the four kinds of applications without hearing and, conversely, it need not hold any hearing on any such application except as a condition precedent to denial thereof.

b) *Ergo*, it need not make or publish any findings (other than mechanically to repeat the formula "public interest, convenience or necessity") where it *grants* an application, even though the application has been subjected to hearing in which adverse parties have participated.

c) *Ergo*, even where the Commission denies an application, its obligation to make or publish any findings (always excepting the stark formula) is doubtful,—at least for a period of 60 days after an appeal is taken and the appellant has been required to file his "statement of reasons" for complaining about findings not yet made (Sec. 402). Parties must look to original suits in court (but not on appeal) for due process (Petitioner's Brief, pp. 52-3).

The foregoing, we submit, is casuistry.

[1] Petitioner apparently concedes, as logic requires it should, that the procedural requirements of Sec. 309(a) are to be read into Sec. 319(a).

(a) *The Commission's Own Interpretation of Sec. 309(a).*

We may properly begin with the Commission's own pronouncements interpreting and applying Sec. 309(a). Its most recent description of the practical application of Sec. 309(a) is found in its report submitted to Congress November 15, 1939:

> "Where the Commission, upon the examination of a particular application, is unable to reach the requisite statutory determination that a grant thereof would serve public interest, convenience, and necessity, it is designated for formal hearing upon specific issues, and all persons having an interest in the matter are given an opportunity to become parties and to participate in the hearing. * * * Under the new procedure, after a hearing has been held the parties thereto are permitted 20 days from the date that the transcript of record is filed within which to file proposed findings of fact and conclusions. The Commission then issues its proposed findings of fact and conclusions and the parties are allowed 20 days thereafter within which to file exceptions thereto and to request oral argument thereon before a final decision is rendered. In the event no exceptions or requests for oral argument are filed, the Commission issues an order adopting and giving final effect to its proposed decision. Under the new procedure, the Commission is able, where a proceeding proves to be noncontroversial, to decide docket cases by issuing its final order in lieu of a proposed decision. This practice is followed whenever it is practicable to do so."[2]

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[2] Fifth Annual Report of Federal Communications Commission, Nov. 15, 1939, at pp. 42-3. See, however, the somewhat contradictory excerpt quoted in Appendix B, p. 77. The report goes on to state:

> "Formal hearings were held on 140 applications involving requests for new stations and for changes in broadcast station facilities, 46 of which were decided and 94 were still pending at the close of the year. Hearings were held on 25 applications involving assignment of licenses and transfer of control of licensee corporations, 14 of which were decided and the remainder were still pending at the close of the year. The majority of such applications were acted upon without the neces-

As early as May 26, 1927, the Federal Radio Commission issued regulations governing hearings on applications providing that "all persons interested in the granting or refusal of the application * * * may appear and will be heard." Beginning with the formal code of regulations adopted by the Commission June 25, 1930, and continuing through the regime of the present Commission until August 1, 1939, the regulations have regularly provided, in substance, that the Commission would not grant an application without hearing unless it first found

> a) that the granting would serve public interest, convenience, or necessity, *and*
>
> b) that the granting of such application would not aggrieve or adversely affect the interests of any licensee, or any person having a pending application.

Otherwise it would designate the application for hearing and interested persons were permitted to participate, by being made parties either directly by the Commission's notice or on petition to intervene. In cases where applications were granted without hearing, provision was made that during a specified period

> "* * * any person aggrieved or whose interests may be adversely affected may obtain a hearing by filing a protest. * * *"[1]

In February, 1931, the Commission instituted the practice, which it adhered to consistently until recently (and to which it still adheres to a large extent), *i. e.*,

> "* * * to issue a decision or a statement in writing of the facts and the grounds for its decision in all cases

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sity of formal hearings. Hearings were also held on 18 renewal of license applications, 5 of which were decided. During the year the Commission heard oral argument in more than 100 broadcast cases, and it adopted formal decisions in more than 200 cases."

[1] Appendix B, p. 59.

[2] Appendix B, p. 73.

> where the decision is adverse to a party of record in the case, or in all cases which may be appealed under the provisions of section 16 of the act. * * *"[5]

The only question raised in the intervening period appears in the following excerpt from the Commission's report submitted to Congress December 14, 1938:

> "A recent decision of the court held that in cases arising under title III of the Communications Act the statement of facts and grounds for its decision should be made by the Commission at the time it enters its order in the premises. Prior to this ruling it had been the practice of the Commission in some cases to enter its final order and at a subsequent date to publish its statement of facts and grounds for decision. The Commission now publishes its findings of facts, grounds for decision, and order at the same time."[6]

On July 12, 1939, effective August 1, 1939, the Commission radically revised its procedural rules so as to call for designating applications for hearing only when

> "* * * the Commission is unable to determine * * * that the granting of such application * * * would serve public interest, convenience, or necessity * * *".

and limited intervention to cases where "intervention will be in the public interest." It thus excluded any consideration of whether any person (licensee, applicant or other) would be adversely affected, both as a factor bearing on

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[5] Fifth Annual Report of the Federal Radio Commission, 1931, pp. 9-10, Appendix B, p. 66. The Federal Radio Commission's decisions were never published as reports and are not available except in mimeographed form. The five volumes of printed reports of the present Commission, covering the period to June 30, 1938, are sufficient evidence of the actual practice of both Commissions. These effectively dispose of the assertion in Petitioner's Brief (p. 50) that neither Commission "has ever assumed * * * that any detailed findings of fact were required".

[6] Fourth Annual Report of the Federal Communications Commission, p. 5. The decision referred to Missouri Broadcasting Co. v. Commission, 94 F. (2d) 623.

whether the application should be set for hearing and as a factor giving a right to participate in a hearing.

It is this revolutionary change in the Commission's application of Sec. 309(a), occurring some 18 months after respondent took its appeal and over six months after the lower court's decision, that is now being urged upon the Court by Petitioner as the *only* correct interpretation of the statute.

(b) *Considerations Supporting the Commission's (until recent) Interpretation.*

As guides to the construction to be given Sec. 309(a) we propose the following, drawn from opinions of the Court:

> "* * * The 'hearing' that such commissions are to give must be adapted to the consequences that are to follow, to the attack and the review to which their orders will be subject. Interstate Commerce Commission v. Louisville & N. R. Co., 227 U. S. 88, 93; United States ex rel. St. Louis S. W. R. Co. v. Interstate Commerce Commission, 264 U. S. 64; Atchison, T. & S. F. R. Co. v. United States, 284 U. S. 248. The Commerce Act, as it stands today, and kindred statutes in the states, are instinct with the recognition of a duty to give a hearing of such a kind that the courts will understand why a Commission has acted as it has if their supervisory powers are afterwards invoked for enforcement or revision. * * *"[1]
>
> "* * * In the case of all acts of Congress, such interpretation ought to be adopted as, without doing violence to the import of the words used, will bring them into harmony with the Constitution. An act of Congress must be taken to be constitutional unless the contrary plainly and palpably appears. The words here used do not require an interpretation that would invest executive or administrative officers with the absolute, arbitrary power implied in the contention of the appellant. * * *"[2]

[1] Norwegian Nitrogen Products Co. v. United States, 288 U. S. 294, at p. 319.

[2] Yamataya v. Fisher, 189 U. S. 86, at p. 101.

"* * * And the act, construed as we construe it, will take no power from the commission necessary to the performance of its duties, and will leave no power with it that it can exercise to the detriment of any right assured to an applicant for a license by the Constitution of the United States."[9]

Sec. 309(a) is easily susceptible of a reading requiring the Commission to afford opportunity for hearing where there is danger of aggrieving or adversely affecting the interests of others.

By the original issuance of a license and successive renewals thereof, the Commission has repeatedly determined that public interest, convenience or necessity is served by the full-time operation of WKBB at Dubuque on 1500 kc. with power of 100 watts, thus automatically authorizing it to give broadcast service over an area having a certain size and a given population. To authorize a new station to operate on the same frequency at an insufficient distance from Dubuque, with resultant interference, means an overlapping of two determinations, both purporting to be pursuant to the standard. It takes away from one broadcaster and one portion of the public in order to give to another broadcaster and another portion of the public. The doubt necessarily raised calls for a hearing to resolve the conflict.

An analogous conflict of determinations under the standard is presented when a second station is proposed for Dubuque itself, the standard having previously been applied so as to permit only one station, with the added circumstance that, with two stations, neither may be able to render good service, and some other area and the population dwelling therein may be deprived of its due under Sec. 307(b).

The words "determine" and "finding" in the first sentence of Sec. 309(a) may in themselves be considered to import notice and hearing where necessary, but it is not necessary to go that far. Sec. 309(a) does not confine par-

[9] Bratton v. Chandler, 260 U. S. 110, at p. 115.

ticipation in the hearing it prescribes to applicants, or exclude persons adversely affected from opportunity to be heard. The Commission is given broad authority to prescribe rules and regulations to govern the hearing.

Sec. 402(b) to (f) cannot be given an intelligible interpretation unless Sec. 309(a) be construed to require opportunity for hearing for persons aggrieved or whose interests are adversely affected. This is shown by the following:

(a) Sec. 402(b)(2), describing the persons other than rejected applicants who may appeal from decisions of the Commission.

(b) Sec. 402(c), requiring the Commission to mail or otherwise deliver a copy of each notice of appeal to *each person shown by its records to be interested in the appeal and to have a right to intervene therein;* to file certain documents, including *evidence*, and "a full statement in writing of the facts and grounds for its decision as found and given by it", and *a list of all interested persons* to whom it has mailed or otherwise delivered the copy of appeal notice.

(c) Sec. 402(d) providing for intervention.

(d) The references in Sec. 402(e) to "findings" and "substantial evidence".

Sec. 405, governing petitions for rehearing is likewise not intelligible unless Sec. 309(a) be construed as we contend it should be. Other provisions confirming this construction are:

(a) Sec. 4(j) which reads in part

"The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. * * * *Any party* may appear before the Commission and be heard in person or by attorney. Every vote and

official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of *any party interested.* * * *" (Italics supplied)

(b) Sec. 5(e) which, while authorizing the Commission to delegate certain functions, stipulates that

" * * * this authority shall not extend * * * to contested proceedings involving the taking of testimony at public hearings, * * * ."

and giving the right of rehearing to

" * * * Any party affected by any order, decision, or report of any such individual commissioner or board * * * ."

(c) Sec. 409(a) which provides in part that

" * * * In all cases heard by an examiner the Commission shall hear oral arguments on request of either party."

(d) The provisions in Sec. 409(c) to (e) having to do with depositions.

It must be conceded that Sec. 309(a) is inartistically phrased. Its origin (as Sec. 11 of the Radio Act of 1927) it was a makeshift, hurriedly drafted by the Conference Committee to bridge the gap between the House and Senate bills. That it is not evidence of any intention on the part of Congress to foreclose or limit opportunity for hearing for all interested parties is clearly demonstrated by its history and the context into which it was inserted.[10]

Petitioner's suggestion that due process is not the Commission's responsibility but falls on the courts and that

"any aggrieved person * * * may institute an original suit in a court of competent jurisdiction." (Brief, pp. 52-53)

[10] Appendix A, pp. 33-38.

comes as a surprise to those who have observed how vigorously (and successfully) Petitioner has resisted any attempt in this direction, always with the claim that the remedy by appeal under Sec. 402(b) is exclusive.[11]

Paramount as is the public interest in radio communication, it must not be forgotten that regulation of the use of radio transmitters, whether through the license system or other governmental machinery, is nevertheless regulation of the use of property, and of liberty to engage in certain callings. Because of the paramount public interest, this regulatory power extends far, even to the point of forbidding most persons to use this property or to engage in such callings, and severely to limit the rights of others within narrow bounds. But the exercise of this regulatory power, great as it is, must at all times be consonant with the essentials of due process.

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[11] McNinch v. Heitmeyer, 105 F. (2d) 41; Black River Valley Broadcasts, Inc. v. McNinch, 101 F. (2d) 235; Monocacy Broadcasting Co. v. Prall, 90 F. (2d) 421; Sykes v. Jenny Wren Co., 78 F. (2d) 729. Petitioner's brief in Sunshine Broadcasting Co. v. Fly et al., Civil Action No. 4638, now pending in the District Court of the United States for the District of Columbia, is more than illuminating. This case is an attempt by the licensee of one of five existing stations in San Antonio, Texas, apprehending economic injury from the possible granting of a pending application for improved facilities for one of the stations, to take the legal remedy now prescribed by Petitioner. Petitioner, however, by motion filed in that court on January 2, 1940, moved to dismiss the complaint. Its brief in support of the motion, tells the District Court, among other things (at p. 12):

> "Such rights as plaintiff may have which could possibly be invalid by any action of the Commission on the KMAC application can be completely vindicated in an appeal under Section 402(b) of the Communications Act of 1934, as amended. * * * Assuming the Commission acted unlawfully in denying plaintiff's petition to intervene and to enlarge issues, if the Commission ultimately grants the KMAC application and thereby invades any right of plaintiff, the remedy by appeal under Section 402(b) will afford plaintiff an adequate method of testing the validity of the Commission's decision."

IV.

Consideration of Confidential Papers by the Commission Deprived Respondent of a Fair Hearing.

The essential facts are set forth above, page 4. See also respondent's notice of demand (R. 418-20); and petition for rehearing (R. 421-22). A motion suggesting diminution of the record was filed in the court below. The question was considered in its opinion (R. 475-6).

Existence of the confidential papers described in respondent's notice and motion is not denied. The confidential papers are not in the record. Their contents are not known to respondent. It believes that their production and certification to the court below is required expressly by Section 402(c) of the Act, which in part provides:

> "* * * Within thirty days after the filing of said appeal the Commission shall file with the court the originals or certified copies of *all papers and evidence presented to it upon the application* involved, * * *" (Italics supplied)

Respondent earnestly urges that it was deprived of a full and fair hearing by the Commission's consideration of confidential papers extraneous to the record, and by failure of the Commission to provide respondent any opportunity to be confronted with, or to refute such statements of fact, opinion, or argument as may be contained in the confidential memoranda. *Interstate Commerce Commission* v. *Louisville and Nashville R. Co.*, 227 U. S. 88, 93; *The Chicago Junction Case*, 264 U. S. 258, 265; *United States* v. *Abilene & Southern R. Co.*, 265 U. S. 274; *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 75; *Morgan* v. *United States*, 298 U. S. 468, 480; *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 292; *Morgan* v. *United States*, 304 U. S. 1, 22.

In the *Louisville and Nashville Case*, *supra*, this court said:

"* * * manifestly there is no hearing when the party does not know what evidence is offered or considered, and is not given an opportunity to test, explain, or refute. * * * All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. * * *" (p. 93)

The consideration of confidential memoranda which was wholly inaccessible, is even more objectionable than the use of material drawn from published annual reports, which was condemned by this court in the *Abilene Case, supra:*

"* * * Nothing can be treated as evidence which is not introduced as such. * * *

"* * * The requirement that, in an adversary proceeding, specific reference be made, is essential to the preservation of the substantial rights of the parties." (pp. 288, 289)

The rule above stated also embraces the right to be confronted with and the opportunity to refute whatever contentions, argument, or opinion statement there may be in the confidential memoranda. In the first *Morgan Case, supra*, this court said:

"A proceeding of this sort requiring the taking and weighing of evidence, determinations of fact based upon the consideration of the evidence, and the making of an order supported by such findings, has a quality resembling that of a judicial proceeding. * * * The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The 'hearing' is the hearing of evidence and argument. If the one who determines the facts which underlie the

order has not considered evidence or argument, it is manifest that the hearing has not been given." (pp. 480, 481)

The rule was restated in the second Morgan Case, *supra*, thus:

> " * * * Again, the evidence being in, the Secretary might receive the proposed findings of both parties, each being notified of the proposals of the other, hear argument thereon and make his own findings. But what would not be essential to the adequacy of the hearing if the Secretary himself makes the findings is not a criterion for a case in which the Secretary accepts and makes as his own the findings which have been prepared by the active prosecutors for the Government, after an *ex parte* discussion with them and without according any reasonable opportunity to the respondents in the proceeding to know the claims thus presented and to contest them. That is more than an irregularity in practice; it is a vital defect." (p. 22)

By express provision of statute, a hearing before this Commission (under circumstances of this case) includes right of oral argument by "either party" Sec. 409(a). See also Sec. 4(j) providing that the Commission's "proceedings shall be public upon the request of any party interested."

CONCLUSION.

It is respectfully submitted that the judgment of the court below should be affirmed, modified, however, to include instructions to the Commission appropriate in the light of our contentions in Point IV.

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February 7, 1940.